

3 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 12-12020-mg

6 | In the Matter of:

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8 | RESIDENTIAL CAPITAL, LLC, et al.,

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Debtors.

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2 Doc# 9059, 8971 Status Conference Regarding (I) The Memorandum
3 Opinion And Order (I) Sustaining In Part And Overruling In Part
4 The ResCap Borrower Claims Trust's Objection To Claim No. 452
5 Filed By Julio Pichardo And (II) Denying Julio Pichardo's
6 Motion To Lift The Automatic Stay.

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8 (CC: Doc# 8810, 8812) (PTBS: Doc# 8568) Hearing RE: The ResCap
9 Borrower Claims Trust's Eighty-Second Omnibus Objection to
10 Claims (No Liability Borrower Claims) Solely as it Relates to
11 the Claims Filed by Philip Emiabata and Sylvia Emiabata (Claim
12 nos. 3910 and 4085). Going Forward Solely as it Relates to the
13 Claims Filed by Philip Emiabata and Sylvia Emiabata (Claim nos.
14 3910 and 4085).

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11 PHILIP EMIABATA

12 Pro Se (Telephonically)

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15 JULIO PICHARDO

16 Pro Se (Telephonically)

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated. We're here in

4 Residential Capital, number 12-12020. Mr. Wishnew?

5 MR. WISHNEW: Good morning, Your Honor. Jordan
6 Wishnew, Morrison & Foerster, for the ResCap Borrower Claims
7 Trust. Your Honor, there are two matters on today's calendar.
8 The first is a status conference concerning the claim objection
9 to claim number 452 by Mr. Julio Pichardo. I believe Mr.
10 Pichardo is on the phone today.

11 THE COURT: Mr. Pichardo, are you on the phone?

12 MR. PICHARDO: Yes, Your Honor. Good morning.

13 THE COURT: Good morning.

14 MR. PICHARDO: I'm on CourtCall.

15 THE COURT: Thank you.

16 Mr. Wishnew, go ahead.

17 MR. PICHARDO: And I wish to address the order first,
18 if I'm allowed?

19 THE COURT: No, I'm going to allow Mr. Wishnew to
20 speak first and then I'll allow you to speak. Okay?

21 MR. PICHARDO: Thank you. Thank you.

22 THE COURT: Go ahead. Go ahead, Mr. Wishnew.

23 MR. WISHNEW: Thank you, Your Honor.

24 Your Honor, with regards to this matter, the Court
25 issued its memorandum opinion and order granting in part -- or

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1 sustaining in part and overruling in part, the Borrower Claims
2 Trust's objection to the claim.

3 The objection was based on two sets of complaints, an
4 initial complaint and a first amended complaint, that Mr.
5 Pichardo previously filed against GMAC Mortgage. Between them,
6 there were approximately nine counts. Your Honor sustained our
7 objection as to four of those counts that concerned the
8 violation of the Fair Debt Collection Practices act, as well as
9 a violation of the False Advertising Law in California. There
10 was also a sustaining of our objection to the negligence claim
11 as well as an unjust enrichment claim.

12 What remains, Your Honor, were claims relating to
13 breach of contract, breach of implied covenant of good faith
14 and fair dealing, negligent misrepresentation, and violation of
15 the California Business and Professional (sic) Code, Section
16 17200, or the UCL, the Unfair Competition Law.

17 Subsequent to the order being -- the memorandum
18 opinion and order being issued, the Borrower Claims Trust did
19 reach out to Mr. Pichardo to try and begin negotiations. It
20 was during those discussions that we got the impression from
21 Mr. Pichardo that he believed he -- there was a finding of
22 liability in his favor and that we were responsible -- or there
23 was a definitive claim against us.

24 We tried to explain to him that simply Your Honor
25 found that there were disputed issues of fact concerning --

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1 MR. EMIABATA: Excuse me, Your Honor. Objection, Your
2 Honor.

3 THE COURT: Mr. Pichardo you have to remain quiet
4 until Mr. Wishnew has finished.

5 MR. EMIABATA: It's just me, Mr. Emiabata, Your Honor.
6 I'm here representing myself. I'm came on the (indiscernible)
7 of my case.

8 THE COURT: That's not Mr. Pichardo speaking. This
9 is --

10 MR. PICHARDO: No.

11 MR. EMIABATA: No, this is Mr. Emiabata. I'm
12 calling -- I'm responding on the case number -- on my claim
13 about 3910, that's --

14 THE COURT: Mr. Emiabata, I will get to your case --

15 MR. EMIABATA: Yes, sir. Yes, Your Honor.

16 THE COURT: Mr. Emiabata, be quiet. I will get to the
17 hearing on your case. It is next on the calendar. It is not
18 the first matter. So remain quiet on the phone or you will be
19 cut off. Do you understand? Do you understand?

20 MR. EMIABATA: I do understand. (Indiscernible) phone
21 and I'm paying for the hour. So if this isn't my case, then I
22 will call the clerk to put me on the hearing when my case
23 called. That's what I'm thinking.

24 THE COURT: Mr. Emiabata. Mr. Emiabata, if you want
25 to be heard by this Court, remain quiet. As soon as I finish

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1 with the first item on the calendar, your case will be called.
2 If you hang up, you will not be heard. Okay? We go in the
3 order in which the calendar is set. Yours is second on the
4 calendar, not first.

5 MR. EMIABATA: Okay, Your Honor. Thank you, Your
6 Honor.

7 THE COURT: Mr. Pichardo's case is first. If you wish
8 to stay on the phone, you need to be quiet until I call your
9 case, or I will have you disconnected. Do you understand?

10 MR. EMIABATA: You can do what you want to do, Your
11 Honor. It's your court.

12 THE COURT: Be quiet. Go ahead, Mr. Wishnew.

13 MR. EMIABATA: You're welcome.

14 MR. WISHNEW: Thank you, Your Honor. So during the
15 discussions that we were having with Mr. Pichardo, we were
16 getting the impression that he believed that there was a
17 definitive finding of liability against the Borrower Claims
18 Trust. We stated to him that based upon the wording of the
19 memorandum opinion and order, there were simply disputed issues
20 of fact concerning the unresolved elements of his claim.

21 Your Honor, at the same time that this matter was
22 proceeding, Mr. Pichardo is also litigating against Ocwen in
23 California. There is currently pending a summary judgment
24 motion filed by Ocwen. And there is essentially an overlap of
25 the unresolved causes of action before Your Honor with the

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1 matters that are going forward on summary judgment.

2 And what I mean by that is, the remaining claims in
3 this court, I think, can be fairly described as contract-based
4 claims and fraud-based claims. The contract-based claims would
5 be the breach of contract and the breach of implied covenant of
6 good faith and fair dealing. The fraud-based claims would be
7 negligent misrepresentation and the violation of the Unfair
8 Competition Law.

9 With regards to the contract-based claims, if the
10 matter were to go forward in California on that matter, we
11 could -- it would essentially resolve those claims and we would
12 only have to deal in this court with the fraud-based claims,
13 the negligent misrepresentation and the UCL claim.

14 What I mean by that, Your Honor, is that if Ocwen wins
15 on its summary judgment motion, then Ocwen -- I'm sorry, if Mr.
16 Pichardo wins and defeats the summary judgment motion, then
17 Ocwen will have to provide the remedy to him, because Ocwen is
18 currently servicing the mortgage --

19 THE COURT: Well, if Pichardo -- are there cross
20 motions for summary judgment?

21 MR. PICHARDO: Your Honor, this matter has been
22 originated by GMAC, the debtors. The action on Ocwen is
23 limited from the time that Ocwen took over this loan. So the
24 gentleman objecting to this issue do want to ward off the
25 negligent --

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1 THE COURT: Mr. Pichardo --

2 MR. PICHARDO: -- issue in the --

3 THE COURT: -- Mr. Pichardo?

4 MR. PICHARDO: Yes.

5 THE COURT: Let Mr. Wishnew finish and then I'll give
6 you a chance to argue.

7 My question, Mr. Wishnew, I mean, is if Ocwen made a
8 motion for summary judgment, and the motion's denied, it
9 doesn't determine the issues. It just denies summary judgment.
10 Are there cross motions or just Ocwen's motion?

11 MR. WISHNEW: My belief -- my understanding is it's
12 just Ocwen's motion.

13 THE COURT: Okay. So and even if it's granted and
14 there's an appeal -- I don't know whether -- what court is it
15 pending in?

16 MR. WISHNEW: It is pending, Your Honor -- one
17 moment -- it's in the Superior Court of the State of
18 California, Orange County.

19 THE COURT: Okay. So --

20 MR. WISHNEW: Before the Honorable Frederick Aguirre.

21 THE COURT: Whatever the ruling of the California
22 Superior Court is on a summary judgment motion, it's not going
23 to be dispositive of what's here. It'll be -- whether it's
24 immediately appealable or not, I don't know. That's not for me
25 to decide. But it isn't going to resolve anything before me.

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1 But go ahead.

2 MR. WISHNEW: Well, I guess our thinking was, Your
3 Honor, to the extent that there -- it would resolve -- to the
4 extent that Mr. Pichardo was to ultimately succeed with -- in
5 his litigation with Ocwen, and the August agreement is found to
6 be valid, then Ocwen, as current servicer, is the one to have
7 to honor, implement, and enforce the August agreement, and
8 thereby provides Mr. Pichardo with the remedy he's ultimately
9 looking for.

10 THE COURT: He's seeking damages here. And that's the
11 only remedy he can seek in this court, is a damages remedy. If
12 he's entitled to damages, if he prevails and he establishes
13 damages, he'll get it -- he'll have an allowed claim.

14 I can't -- I'm not going to sit -- so if summary
15 judgment is granted in Ocwen's favor, and there's an appeal, it
16 could be a very considerable time before that appeal is
17 resolved. If the motion for summary judgment is denied, my
18 understanding about the docket -- Superior Court docket in
19 Orange County is it could be years before the matter is
20 resolved. I'm not waiting years. We're moving forward here.

21 MR. WISHNEW: Understood, Your Honor.

22 MR. PICHARDO: May I, Your Honor?

23 THE COURT: Let me see if Mr. Wishnew wants to add
24 anything else.

25 MR. PICHARDO: Oh, okay.

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1 MR. WISHNEW: Sure.

2 THE COURT: And you're acknowledging that Mr.
3 Pichardo's negligent misrepresentation and California Business
4 Professions Code 17200 claim will remain, whatever happens in
5 the Orange County Superior Court.

6 MR. WISHNEW: That's correct, Your Honor.

7 THE COURT: Okay.

8 MR. WISHNEW: And so we would push forward and try and
9 reengage with Mr. Pichardo on settlement. And ultimately, if
10 that doesn't succeed, move forward towards an evidentiary
11 hearing and any related discovery. Our thinking --

12 THE COURT: We're not bifurcating the issues
13 respecting Mr. Pichardo's claim.

14 MR. WISHNEW: Okay.

15 THE COURT: Four causes of action survived the Trust's
16 objection to the claim. Unless the matter is resolved by
17 settlement, it's my intention to move forward expeditiously
18 with any evidentiary hearing that's required, briefing, et
19 cetera, to resolve the claims.

20 If Mr. Pichardo prevails here and establishes damages,
21 he'll get an award. If he doesn't, he won't. But I'm not
22 going to proceed with the negligent misrepresentation and
23 California Business and Professions Code 17200 claims and leave
24 the other two aside for an uncertain future, and then me have
25 to revisit them. So this is going to get done here in one

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1 setting.

2 MR. WISHNEW: Okay. And just so the record's clear,
3 and hopefully Mr. Pichardo understands this, I would like to
4 think that the Borrowers Trust was correct when we represented
5 to Mr. Pichardo that Your Honor's prior opinion and order did
6 not find --

7 THE COURT: Well, I want to hear from Mr. Pichardo
8 before I make --

9 MR. WISHNEW: Okay.

10 THE COURT: -- any comments about that.

11 MR. WISHNEW: Okay.

12 THE COURT: Anything else you want to add, Mr.
13 Wishnew?

14 MR. WISHNEW: That's it, Your Honor.

15 THE COURT: Mr. Pichardo, it's your turn. Go ahead.

16 MR. PICHARDO: Your Honor, when contacting -- being
17 contacted by the Trust's attorney, the first thing they wanted
18 to say to me is, well, everything here was sustained. I said,
19 no, wait a minute. There were findings that you are negligent
20 for misconduct and several others. And there are five points
21 that you were overruled on.

22 So the first issue I said is, are you representing
23 Ocwen? They said, no. Are you speaking for Ocwen? No. So I
24 said okay, then we could probably start negotiating based upon
25 the judge's overruling of the points that I presented and that

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1 I -- that I was able to have from the Court.

2 And then there was a wrangling about, oh, no, we think
3 that all of this is disputed facts. And I said no, there was a
4 number of issues which were requested from you to answer that
5 there were no disputes on. And those issues, I presented to
6 them, and the problem -- this is where they said okay, we're
7 going to try to see what we can do.

8 For three -- for all this time, since this ruling was
9 made, I sent them even other evidence of -- of times I was
10 admitted at the hospital for -- the costs and everything. And
11 I've been waiting, and no one responds. So I said based on
12 their -- on their observation that probably
13 everything -- according to them everything is -- was sustained,
14 I said no, it wasn't. And number two that there are issues
15 that were not disputed, and you requested a response from the
16 counsel on those issues.

17 And I said those issues were very clearly stated.
18 There was no dispute of negligent misrepresentation, and the
19 Trust has not denied the fact that it took action to alter my
20 rights under the contract agreement.

21 And also, I said the Trust asserted that -- that I
22 didn't make additional payments to ward off criminal liability.
23 And I pointed those out to them. Probably, they didn't like
24 it. But I said look, I cannot explain to you or go against the
25 ruling. That is not -- not the issue why we're talking. We're

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1 talking to see if we can come to a settlement. But we're not
2 going to question the judge's rulings. They're very clear.

3 And this is what they were bringing to me. And I said
4 no, this was -- there were some sustained, but the main issues
5 on this -- on this claim were overruled. And there are things
6 that were not disputed. So I addressed that with the -- with
7 the Trust. And apparently -- they apparently did not -- didn't
8 have a clear understanding.

9 And I said there is an issue also about a contract
10 which, Your Honor, I've been dealing for eighty-eight months,
11 and forty-five of those months were with this debtor. They put
12 me in this -- in this juncture. This agreement was brought
13 up -- my agreement, our ResCap agreement was brought up in
14 according with agreement of both parties. And everything was
15 placed in writing. And then they tried to change this. And
16 they're trying to address Ocwen. And I said, but you said to
17 me that Ocwen is not part of this. And since it's not, then I
18 have to address Ocwen here.

19 But that, as you mentioned, Your Honor, it's
20 another -- it's something else. Because Ocwen is
21 saying -- they just sent me a threatening letter saying even if
22 you go by Judge's -- Judge Glenn's ruling, we -- you are to
23 assume the responsibility. In other words, they're telling me
24 to face the music with them, because your ruling will not
25 be -- will not be valid.

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1 And I said wait a minute. Then I have to get this
2 valid agreement enforced before anything happens. And that's
3 why I requested the order, Your Honor.

4 THE COURT: All right, thanks, Mr. Pichardo.

5 Let me see. I don't give advisory opinions, but I do
6 want to make a couple of points. When the issues came before
7 me on the Trust's objection to your claims, and I entered a
8 written opinion resolving the claims, the objection -- the
9 Trust's objection to certain of the claims was sustained, and
10 as to the others, as to four of them, they were overruled.

11 But that doesn't -- I do want to be clear about this.
12 In ruling on a claim objection, I didn't make any factual
13 findings. So if the matter goes forward with respect to the
14 four remaining claims: breach of contract, breach of implied
15 covenant, negligent misrepresentation, California Business and
16 Professions Code 17200, you're going to have the burden of
17 proof at trial on all four -- of proving the facts to support
18 your allegations as to all four the claims.

19 An opinion sustaining in part and overruling in part
20 claim objections does not include findings of fact. It
21 essentially is the equivalent of a motion to dismiss, if you
22 were in the state superior court. There's apparently a summary
23 judgment pending. That does involve factual findings.

24 MR. PICHARDO: Um-hum.

25 THE COURT: But my ruling so far in this case doesn't

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1 involve any factual findings. If this matter --

2 MR. PICHARDO: I understand, Your Honor.

3 THE COURT: -- if this matter -- let me just finish.

4 If this matter proceeds to trial, which I'm certainly fully
5 prepared to have it do, it'll proceed to trial on all four of
6 your claims. You'll have the burden of proving the facts to
7 support each of those claims. The Trust will have an
8 opportunity to rebut the facts, assert any defenses it believes
9 it properly can. They'll have to come in with proof.

10 So the next stage here, if it gets to that, is an
11 evidentiary hearing, where you'll have to prove facts; they'll
12 have to prove facts. Okay?

13 MR. PICHARDO: Right.

14 THE COURT: But my ruling so far -- don't
15 misunderstand -- is not -- I didn't find that you had
16 established each of those remaining claims or any of those
17 remaining claims. I found that you had properly stated a
18 claim. In applying the standards for claim objections, I found
19 that the Trust had not satisfactorily rebutted at least one
20 essential element of each of those four state law claims.

21 So what you and -- I don't get in -- before I have to
22 be the trier of fact, Mr. Pichardo, I don't get involved in
23 settlement negotiations, because if it goes to trial --

24 MR. PICHARDO: I understand; I understand.

25 THE COURT: -- I have to make findings for

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1 either -- hear the evidence and make factual findings.

2 MR. PICHARDO: Yes.

3 THE COURT: I'm certainly prepared to do that if I
4 have to. Hopefully you're aware, most matters end in
5 settlement. And I guess what I've usually found from when I
6 practiced law and the almost nine years on the bench, the best
7 settlements are ones that neither side is a hundred percent
8 happy.

9 MR. PICHARDO: Um-hum.

10 THE COURT: But I don't force anybody to settle.

11 MR. PICHARDO: Right, right.

12 THE COURT: I can't force the Trust to settle with
13 you, and I can't force you to settle with the Trust.

14 MR. PICHARDO: I understand, Your Honor.

15 THE COURT: All I can say is that you and the
16 Trust -- you know, you ought to try your best to settle it. If
17 you can't, well, then let's get the case ready for trial. I
18 try to move these things along as quickly as possible.

19 MR. PICHARDO: Right, right.

20 THE COURT: That's what we need to do.

21 MR. PICHARDO: I have a question, Your Honor.

22 THE COURT: Yeah, go ahead.

23 MR. PICHARDO: On page 23, your ruling says that the
24 validity of the August agreement, the Court concludes that the
25 August agreement satisfies the requirements of a valid binding

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1 contract between GMAC and Pichardo. I was just simply
2 addressing that with the Trust, because that is a fact. And
3 that the Trust is barred from extrinsic evidence rule, which
4 you also ruled upon because there are no contract formation and
5 there is fraud issues of the Statute of Frauds which applies
6 here.

7 So you have concluded that the August agreement,
8 according to this decision at 23, satisfied the agreement to be
9 a valid contract between GMAC and Pichardo.

10 THE COURT: But that doesn't --

11 MR. PICHARDO: I find some other --

12 THE COURT: -- Mr. Pichardo, my ruling doesn't
13 preclude the Trust from asserting whatever defenses it wishes
14 to assert.

15 MR. PICHARDO: I understand that.

16 THE COURT: I'm not prejudging that. Look, you came
17 out on the right side -- from your standpoint, you came out on
18 the right side of that issue. You argued you had a valid and
19 binding contract; they argued you didn't. Looking at the four
20 corners of the agreement, I concluded you'd properly stated a
21 claim for breach of that contract. Okay?

22 And if we go to trial, you'll put your evidence in and
23 they'll put their evidence in, and I'll have to ultimately
24 decide the issues.

25 So I think what you and Mr. Wishnew need to do is you

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1 ought to talk about what, if any, discovery each side wishes to
2 take, how long it's going to take to do that, when you
3 believe -- when each side believes this matter will be ready
4 for trial. I try to set trials as quickly as possible, once a
5 case is ready for trial.

6 It's unquestionably difficult for parties without
7 lawyers to proceed, because I require -- but the law permits,
8 and that's fine; I have no problem about it. But there'll have
9 to be a pre-trial conference order. You'll have to list all
10 your exhibits, et cetera. But --

11 MR. PICHARDO: Right.

12 THE COURT: -- so the next step, you and Mr. Wishnew
13 ought to have a further discussion. If you want -- if the two
14 of you can reach a settlement, that's fine. If you can't,
15 let's get this case ready for trial, and we'll do it. You'll
16 get your day in court.

17 MR. PICHARDO: Right. And that's what I've been
18 waiting on. But there's nothing and no response from them on
19 that, Your Honor. That's what I've been waiting since you
20 issued this ruling and since our last conversation which we
21 came to it.

22 So for this month-and-a-half, I've been waiting. And
23 I even sent e-mails sending a response, so can you require a
24 response --

25 THE COURT: I don't know what you're waiting --

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1 MR. PICHARDO: -- from the counsel, then?

2 THE COURT: Look, here's -- from where I'm -- from my
3 perspective, I encourage you to continue settlement
4 discussions.

5 MR. PICHARDO: Right; right.

6 THE COURT: But -- but -- the big "but" is, you've got
7 to move forward to get ready for trial.

8 MR. PICHARDO: Right,; right.

9 THE COURT: Doing -- they're not mutually
10 exclusive -- let me make clear. And hopefully you'll reach a
11 settlement that you're satisfied with. If not, you'll get
12 your -- the trial, okay?

13 MR. PICHARDO: Right. Great.

14 THE COURT: That's what's going to happen.

15 MR. PICHARDO: I understand, Your Honor.

16 THE COURT: All right. So talk to Mr. Wishnew. Mr.
17 Wishnew, see if we can get a scheduling order --

18 MR. WISHNEW: Yep.

19 THE COURT: -- done reasonably quickly.

20 MR. WISHNEW: Yes, Your Honor.

21 THE COURT: Okay?

22 MR. WISHNEW: Yep.

23 THE COURT: I would like to get this matter, if
24 necessary, to trial. Okay? And I'm not going to wait to see
25 what happens in Orange County --

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1 MR. WISHNEW: Understood.

2 THE COURT: -- because it's not going to be
3 dispositive of the issues here. Okay?

4 Thanks, Mr. Pichardo.

5 MR. PICHARDO: Thank you, Your Honor.

6 THE COURT: Okay. So you can remain on the phone or
7 not. It's up to you. Okay?

8 MR. PICHARDO: No, I'm going to wait until the counsel
9 will contact me either by e-mail or by phone.

10 THE COURT: Okay.

11 MR. PICHARDO: I did wait, like I said, six weeks of
12 waiting. But I guess I'm going to wait and see if they --

13 THE COURT: He'll be --

14 MR. EMIABATA: -- when they call me.

15 THE COURT: Mr. Wishnew will be in touch with you
16 promptly.

17 MR. PICHARDO: Thank you. Thank you.

18 THE COURT: Correct, Mr. Wishnew?

19 MR. WISHNEW: Yes, Your Honor.

20 THE COURT: Okay, thanks very much, Mr. Pichardo.

21 MR. PICHARDO: Thank you. Bye-bye.

22 THE COURT: All right, the next matter, Mr. Wishnew.

23 MR. WISHNEW: Thank you, Your Honor. The next and
24 last matter is item under subheading -- I'm sorry -- under
25 section 2, claims objections, the ResCap Borrowers Claims Trust

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1 eighty-second omnibus objection to claims. The only claim
2 going forward today relates to the claims of Mr. and Mrs.
3 Emiabata, claim numbers 3910 and 4085.

4 THE COURT: All right. Mr. Emiabata, you're on the
5 phone?

6 MR. EMIABATA: Yes, Your Honor.

7 THE COURT: Okay. Go ahead, Mr. Wishnew.

8 MR. WISHNEW: Thank you, Your Honor.

9 Your Honor, the Borrower Claims Trust originally filed
10 the objection in January, and there was an order entered
11 expunging the Emiabatas' claims. That was at docket number
12 8402. The Emiabatas filed a motion for reconsideration at
13 docket number 8545 stating they did not receive a copy of our
14 objection. The Borrower Trust agreed to withdraw the order and
15 reserve the objection on the Emiabatas. The Emiabatas filed a
16 response on June 3rd, 2015 at docket number 8726.

17 On June 26th of this year, the Borrower Trust filed a
18 reply and supplemental objection to address one issue not
19 raised in the original objection and permitted the Emiabatas to
20 respond to that additional issue.

21 The Emiabatas responded on August 20th, 2015. That
22 was at docket number 9049. And the Borrower Trust filed a
23 brief reply last week at docket number 9069.

24 Your Honor, through the eighty-second omnibus
25 objection, the Borrower Trust seeks to expunge these two proofs

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1 of claim because there is no evidence of specific wrongdoing by
2 the debtors. The Borrower Trust thoroughly examined the
3 debtors' books and records in an effort to validate the
4 accuracy of the allegations made in the underlying complaint,
5 and determined that there's no liability due and owing.

6 In support of the objection and the reply and
7 supplemental objection, the Borrower Trust submitted a
8 supplemental declaration by David Cunningham, director of
9 regulatory and compliance for the ResCap Liquidating Trust.
10 Mr. Cunningham is on the phone today and available to answer
11 any questions the Court might have for him.

12 Your Honor, for the reasons set forth in the objection
13 and the reply, the Emiabatas have not demonstrated any
14 liability of the debtors related to the origination or
15 servicing of their loan that would give rise to a claim. Their
16 origination claim fails because the debtors were not involved
17 in the origination of this loan. The servicing claims also
18 fail because the allegations of misapplied payments, improper
19 denial of loan modifications, and improper escrow charges, are
20 not supported by any evidence or specific allegations to
21 demonstrate any wrongdoing.

22 Accordingly, it is the Borrower Trust's position the
23 Emiabatas did not sufficiently meet their burden by
24 demonstrating by a preponderance of the evidence, a valid claim
25 on these bases against the debtors.

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1 As noted in the reply, in addition to the previously
2 mentioned reasons, many of the allegations are also barred by
3 statute of limitations, specifically a four-year statute of
4 limitations for fraud and breach of contract, which would bar a
5 claim for any alleged wrongdoing that occurred prior to October
6 25th, 2007, as the complaint that was filed against GMAC
7 Mortgage was filed on October 25th, 2011.

8 The objection -- the original objection did not
9 include the statute of limitations argument, so this was made
10 as part of the supplemental objection, and the Emiabatas were
11 given a chance to respond. The Emiabatas have not put forth
12 any reason that the statute of limitations should not apply,
13 and therefore have failed to demonstrate that they can recover
14 for any alleged wrongdoing that preceded October 25th, 2007.

15 In short, Your Honor, for the reasons set forth in the
16 reply and supplemental objection, the Borrower Trust would ask
17 that the Court expunge these two claims.

18 THE COURT: Let me ask you this, Mr. Wishnew. The
19 Emiabatas allege that the trust misapplied payments they made.

20 MR. WISHNEW: Correct, Your Honor.

21 THE COURT: And am I correct that the Trust concedes
22 that at least one payment that the Emiabatas made was
23 misapplied?

24 MR. WISHNEW: One moment, Your Honor.

25 THE COURT: And my question really is, when was that

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1 payment made?

2 MR. WISHNEW: Sure.

3 (Pause)

4 THE COURT: If you look at the proposed order you've
5 submitted --

6 MR. WISHNEW: Yes, Your Honor.

7 THE COURT: -- at pages 18 and 19?

8 MR. WISHNEW: Um-hum.

9 MR. EMIABATA: Judge -- Your Honor, can I talk here?

10 THE COURT: No, just wait, Mr. Emiabata. I'll give
11 you a chance to make your entire argument.

12 (Pause)

13 THE COURT: If you look, Mr. Wishnew --

14 MR. WISHNEW: Yes, Your Honor.

15 THE COURT: -- in your binder, behind Exhibit 1 is the
16 proposed order granting the Trust's omnibus objection. And if
17 you look at page 23 of 46 --

18 MR. EMIABATA: Excuse, Your Honor, I'm really -- the
19 reason I'm raising this issue is because --

20 THE COURT: Mr. Emiabata, please do not interrupt. I
21 will give you chance to make your argument.

22 MR. EMIABATA: Because I'm concerned that the -- I'm
23 concerned that the -- we have the evidence for you; we are
24 looking at the evidence in this court. He wasn't going to have
25 it. That is why --

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1 THE COURT: Mr. Emiabata -- Mr. Emiabata.

2 MR. EMIABATA: Yes, Your Honor?

3 THE COURT: If you interrupt I will have you cut off.

4 MR. EMIABATA: You can (indiscernible).

5 THE COURT: Be quiet until you're called on. It is
6 not your turn to speak.

7 MR. EMIABATA: I'm aware -- okay, Your Honor.

8 THE COURT: Mr. Wishnew --

9 MR. EMIABATA: (Indiscernible) all this paper.

10 THE COURT: Mr. Emiabata --

11 MR. EMIABATA: Yes, Your Honor?

12 THE COURT: -- this is the last warning.

13 Mr. Wishnew, page 23 of 46, the last paragraph on the
14 page, the last sentence on that page: "Debtors confirmed all
15 payments listed except one had been received. Debtors also
16 confirmed that the payments received were correctly applied to
17 the account. Note the payments received." I'm not sure that
18 that indicates a misapplication. Just a second, Mr. Wishnew.

19 MR. WISHNEW: Sure.

20 THE COURT: I may have misread that paragraph.

21 MR. WISHNEW: Okay, Your Honor. Because I do know
22 that as part of the supplemental declaration --

23 THE COURT: Yes.

24 MR. WISHNEW: -- of Mr. Cunningham, we did put in
25 Exhibit M which talks about the reconciliation of payments

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1 between June 21st, 2005 and September 15th, 2007.

2 THE COURT: Okay.

3 MR. WISHNEW: And that is intended to reconcile the
4 application of payments reflected in our books and records
5 against the list of payments that the allegation of
6 misapplication is made. And that list of payments is found at
7 Exhibit P, as part of the correspondence that the claimants put
8 in. Specifically, it's at page -- the claimants' list, the
9 evidence of payment, is at Exhibit P as in Peter --

10 THE COURT: Yes.

11 MR. WISHNEW: -- page 15 of 16.

12 THE COURT: Let me get there.

13 MR. WISHNEW: At docket number 8810.

14 THE COURT: Okay, yes, I'm there.

15 MR. WISHNEW: Okay. So that list of payments is then
16 reconciled in Exhibit M which the Borrower Trust prepared and
17 talks about how the payments were applied to the earliest past-
18 due payment. And so how -- in essence, because the Chapter 13
19 plan was not completed --

20 THE COURT: Right.

21 MR. WISHNEW: -- the account was not brought current.
22 There were certainly payments made and there were payments
23 applied. But because it was not fully performed under, it was
24 not brought current as of 2007.

25 THE COURT: Okay. And I think I may have misread --

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1 MR. WISHNEW: Okay.

2 THE COURT: -- the exhibits, because now that I look
3 more carefully, it seems to me that there is no acknowledgement
4 about one payment being misapplied. In fact, you reconciled
5 the payments that were made.

6 MR. WISHNEW: Exactly, Your Honor.

7 THE COURT: Okay.

8 MR. WISHNEW: Yes.

9 THE COURT: Thank you very much.

10 MR. WISHNEW: No problem.

11 THE COURT: All right, Mr. Emiabata, it's your turn to
12 argue.

13 MR. EMIABATA: Your Honor, my wife is part of
14 this -- part of this issue, but she went to the hospital,
15 because she had the eye problem, and yesterday she went to
16 specialist. They were looking at her eye; they think she might
17 (indiscernible), I don't know. But she went back tonight
18 because she was having pain. So I'm the only one here to
19 answer these questions, because she's still on the -- in the
20 hospital. Then -- (indiscernible) diagnosed her eye problem.
21 She went yesterday -- she went today with both of the problem
22 in the eye, and then she -- yesterday night, and she
23 went -- she went up to the hospital.

24 So she's -- she's there but anyway, and she's up, but
25 I don't see how we can go on, because yesterday she went to the

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1 specialist. They want to follow that. She had involved with
2 her eye. (Indiscernible). They put something on her -- they
3 put something on her eye. And actually it's (indiscernible)
4 both of her eyes.

5 So she -- I just want somebody to take up to the
6 hospital in case we're going home. I don't know how this case
7 will continue when she's not here.

8 THE COURT: Mr. Emiabata, do you wish to address the
9 arguments that the Trust has made for why your claims should be
10 expunged? If so, please now is the time to do so.

11 MR. EMIABATA: Judge, okay, but my whole case is the
12 argument the Trust made, yeah, that they -- they claim there
13 were no wrongdoing. The reason they claim they were no
14 wrongdoing is that they were (indiscernible). There was a lot
15 of wrongdoing because we instituted a suit against them in in
16 the district court; we told the bankruptcy with
17 (indiscernible). And issue was raised in the bankruptcy -- the
18 district court, it showed bad faith, (indiscernible),
19 wrongdoing on the payments.

20 So they didn't do a tracking. When -- what the Court
21 should be aware, the district court called the case on the
22 (indiscernible) that this court will resolve all those legal
23 issue and the material facts; we said that in the district
24 court.

25 So when they decide to go with this omnibus claim,

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1 they said there was issue of wrongdoing. We're aware there was
2 issue of payment, and we immediately (indiscernible) record, I
3 would be able to point out if this issue were truth. And I'd
4 be able to figure out all the documents we have if this awarded
5 by the (indiscernible) is true. But nobody said they need
6 discovery from them, and I've got (indiscernible).

7 Even this court now, you can tell what they're doing;
8 this court (indiscernible) difficulties to reconcile what about
9 the payment they said that they applied to this payment we made
10 when we were in bankruptcy Chapter 13. There were a lot of
11 issues that rise. Payment, that issue, we did tell this Court
12 that (indiscernible) is barred. Yes, he's been barred. We
13 need evidence to see whether this is true or not true. And
14 that is why we have this call: we needed discovery to find out
15 whether this is true or not true so that we can reconcile what
16 document we have.

17 So that issue is not settled (indiscernible) this
18 court. We settle the issue with how we raised within district
19 court on (indiscernible) tracking, and (indiscernible) we went
20 on Chapter 13 with this mortgage. We've not given us adequate
21 (indiscernible). So I don't know this (indiscernible) have we
22 given discovery and see the paper that's (indiscernible)
23 according to them.

24 They claim here they have all this evidence, they told
25 they'd call me with telephone, (indiscernible) say it was by

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1 fax. They know I give this card; which fax they used, which
2 number they used, or where they made the call to. And the most
3 issue we are -- we are having is whereby we are appealing the
4 decision of that -- of the (indiscernible) hearing. We
5 appealed the court. We asked this Court to -- to
6 (indiscernible) issue we have and that is omnibus.

7 One of things that said, there was an issue -- there
8 was an order you -- you -- order this Court made. According to
9 the order, you said it's (indiscernible) amended to be
10 (indiscernible) argue or say that they -- that we were not sell
11 the -- the it was sent to the wrong address.

12 We do not (indiscernible). We were not the one that
13 asked the court, Judge, to send it to the wrong address. It
14 was the -- the (indiscernible) argument after you cleared that
15 and that they sent this paperwork to the wrong address. But
16 the order you remark that we are the one that told the Court
17 that we -- the document was sent to the wrong address. And
18 that document, we (indiscernible) this to prepare this issue.

19 We thought we go on with this omnibus which you denied
20 us, and hence we appeal that decision to the district court as
21 appeal to them, it shouldn't have the file with you.

22 So I know we're pretty much with you. I think
23 that being (indiscernible), we then ask the Court to look at
24 docket 102 -- 9102. We put that -- we put it in yesterday also
25 for you to say actually, or to resolve with clarity of this

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1 issue from the district court.

2 So we don't know why the case go on today
3 (indiscernible) the court, with the judge. My wife -- my wife
4 if (indiscernible) had been sick. I did tell you that's
5 (indiscernible); that is why I decide to call in to -- to read
6 my objection because there's two issue -- there's two
7 areas -- motion presented in this court. One motion of
8 (indiscernible) rejection and the second one of the stay of
9 action which is docketed 9102, and the other one is at 9103.
10 That is -- is the order of the removal of -- for you to remove
11 the automatic stay from that, so that we can take our case back
12 to the district court.

13 Because everything equal, the issue here is very
14 simple. We have a case against these people in the district
15 court to -- the case was laying there for many years. They
16 never do (indiscernible). They wait on bankruptcy. So the
17 district court of (indiscernible) did schedule the result in
18 this bankruptcy court.

19 Then we wonder how can this court resolve this issue
20 when the -- when the material -- the legal issue and material
21 facts were not resolved in the district court, and in this
22 court they won't be -- they do not dismiss the case; they
23 resolve it. The (indiscernible) this court will be -- resolve
24 the issue.

25 We are wondering how this Court will resolve

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1 this -- resolve the facts about (indiscernible). These are
2 contracts for (indiscernible) who are tracking which we related
3 in the district court. But the Court here (indiscernible)
4 issue was after the reason appealed to the district court.
5 What about issue of advantage? What about issue of
6 (indiscernible) tracking? What about issue about rule -- the
7 original rule? What about the live issues?

8 So there are a lot of issue, so we are wonder
9 why -- that's why we ask that this Court should report
10 (indiscernible), that this Court should (indiscernible) the
11 legality of this case. So we are wondering why the Court go
12 ahead and want to hear this omnibus today.

13 And I said that my wife's not here and this is part
14 of the -- part of the claim succeed. And we put a lot already
15 into our considered position of that it was appealed, and it's
16 docketed in your court and if Your Honor resolve those issues
17 and want to go ahead on them, hear this case. And if we insist
18 on that we needed discovery from them before -- before we can
19 (indiscernible) do our full case.

20 In this case, we don't have no discovery. They are
21 claiming they (indiscernible). And there's no evidence
22 to -- to extract the authenticity of those -- every redaction.
23 They are (indiscernible) you can see that the court is there
24 (indiscernible) to fight even, or to try.

25 We are claiming that they do wrongdoing, yet they

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1 claim they don't do wrongdoing. We ask for documents to prove
2 that we are doing the wrongdoing. (Indiscernible) tell the
3 court I'm just submit everything. Okay, we don't do
4 wrongdoing. Well, no, they -- that letter say they didn't do
5 wrongdoing, yes. But we want evidence from them to show -- to
6 prove it, because I know they did the wrongdoing in this with
7 the (indiscernible) payment.

8 Are we talking about privilege? We pay them -- we're
9 once (indiscernible) see the -- receive from them, they
10 received the (indiscernible) petition. How did -- how did it
11 apply the whole (indiscernible) went bankrupt in about two
12 years. (Indiscernible). It doesn't make no sense. And if you
13 look at the -- the -- what you call it -- the evidence
14 (indiscernible) control it. But one side it said they assume
15 the call was with telephone, when they didn't give the court
16 (indiscernible) that anybody called. They didn't give the
17 court (indiscernible). Everything was just they're making
18 talk. And that's why we want evidence by this Court.

19 We then -- we then we will be able to put on a full
20 defense in this -- in this hearing. Now we'll have that fight.
21 We don't have nothing to defend it with. But we want this
22 Court -- we want evidence for us to prove that they -- the
23 evidence of them that they did us wrongdoing. They cannot just
24 say they didn't do us wrongdoing. We want a paper from them.
25 When they give us -- when they give you the evidence, when they

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1 give us what we asked for, then we can -- we can work
2 out -- put on a true defense. We are (indiscernible). We are
3 Americans.

4 (Indiscernible) we are the ones that sued them. They
5 didn't sue us. And the case was (indiscernible). It was only
6 closed because the court believed that this Court would be able
7 to resolve it. But then my question I make to this Court: how
8 will this Court resolve this issue of material fact -- issues
9 of legal and material facts which are not resolved in the
10 district court?

11 And that is what I answer (sic) this Court -- that is
12 what I ask this Court, shall I (indiscernible) by the case is
13 stayed until after this issue is resolved. Because
14 where -- (indiscernible) that's to recover all the -- our
15 money.

16 One hand they say they own it; one hand they say they
17 are not originator of the loan. We have evidence that says
18 they did. We (indiscernible) evidence. That (indiscernible)
19 where we did (indiscernible) because this issue is not as
20 prepared in the district court. And it's not (indiscernible)
21 closed.

22 So again, Your Honor, how will we resolve the issue
23 that was not discussed in the district court, wasn't
24 (indiscernible) on the assumption that this Court would resolve
25 it without all the discovery? How do we -- how can we resolve

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1 those issues, Your Honor?

2 THE COURT: Anything else you wish to argue, Mr.
3 Emiabata?

4 MR. EMIABATA: No, Your Honor, not really.

5 THE COURT: All right. The Trust's objection to
6 claims 3910 and 4085 is sustained, and the claims are expunged.
7 And order will be entered forthwith. An opinion will be issued
8 explaining -- further explaining the basis for the Court's
9 ruling.

10 Does that conclude the calendar for today?

11 MR. WISHNEW: It does, Your Honor.

12 THE COURT: All right, we're adjourned.

13 MR. WISHNEW: Thank you very much for your time. Have
14 a good Labor Day.

15 (Whereupon these proceedings were concluded at 10:51 AM)

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2 I N D E X

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4 RULINGS

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7 is sustained, and the claims are expunged

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2 C E R T I F I C A T I O N

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4 I, Penina Wolicki, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

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Penina Wolicki

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12 PENINA WOLICKI

13 AAERT Certified Electronic Transcriber CET**D-569

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19 Date: September 4, 2015

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